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September 14, 2020

Re. The Pregnant Workers Fairness Act (H.R. 2694)

DEAR REPRESENTATIVE:

On behalf of A Better Balance, I write to express our strong support for the Pregnant Workers Fairness Act (“PWFA”; H.R. 2694). This legislation will ensure pregnant workers, particularly low-income workers and women of color, are not forced to choose between their paycheck and a healthy pregnancy. The bill will require employers to provide reasonable accommodations for pregnant workers unless doing so would impose an undue hardship on the employer, similar to the accommodation standard already in place for workers with disabilities.

Nearly forty-two years after the passage of the Pregnancy Discrimination Act, pregnant workers still face rampant discrimination on the job and treatment as second-class citizens, as I explained in detail in my Congressional testimony before the House Education & Labor Civil Rights and Human Services Subcommittee in October 2019 as well as A Better Balance’s May 2019 report, *Long Overdue*. We urge you to support healthy pregnancies, protect pregnant workers’ livelihoods, and end the systemic devaluation of women of color and vote YES on the Pregnant Workers Fairness Act and NO on any Motion to Recommit in connection with this legislation.

A Better Balance is a national non-profit legal organization that advocates for women and families so they can care for themselves and their loved ones without sacrificing their financial security. Since our founding, we have seen day in and day out the injustices that pregnant workers continue to face because they need modest, temporary pregnancy accommodations and have led the movement at the federal, state, and local level to ensure pregnant workers can receive the accommodations they need to remain healthy and working. As I wrote in my 2012 Op-Ed in *The New York Times* “Pregnant and Pushed Out of Job,” which sparked the PWFA’s introduction in Congress, “For many women, a choice between working under unhealthy conditions and not working is no choice at all.”¹

Through our free, national legal helpline, we have spoken with hundreds of pregnant workers, disproportionately women of color, who have been fired or forced out for needing accommodations, often stripping them of their health insurance when they need it most, driving them into poverty, and at times, even homelessness. Other women we have assisted were denied accommodations but needed to keep working to support themselves and their families and faced devastating health consequences, including miscarriage, preterm birth, birth complications, and other maternal health effects.

In the past few months alone, we have heard from women across the country who continue to face termination or are forced out for needing pregnancy accommodations. A retail store employee from Missouri who is pregnant and due in November 2020 called us after she was forced to quit her job because her employer refused to let her carry a water bottle on the retail floor even though she was experiencing severe dehydration due to hot temperatures in the store this summer. A massage therapist from Pennsylvania called us in June 2020 requesting to return to work on a part-time basis on the advice of her OB-GYN after experiencing cramping in her uterus. Her employer responded that they would not accommodate her and cut off all communication with her after that, forcing her out of work just three months before she was due to give birth. A nurse we spoke with from Pennsylvania who was six months pregnant requested to avoid assignment to the COVID-19 unit. Though her hospital was not overwhelmed by the pandemic, had many empty beds, and other workers were being sent home, her employer refused her request and made heartless comments mocking her need for accommodation. She decided not to jeopardize her health and lost pay for missing those shifts as a result. She also worried about being called to the COVID unit shift constantly.

Without the law on their side, these women had little legal recourse because they lived in a state without a state-level pregnant workers fairness law. On the other hand, when a pregnant worker in upstate New York—where a state pregnancy accommodation is already in place—requested to telecommute in June 2020 due to underlying health issues, she was quickly able to engage her employer in a good faith interactive process and her employer approved her request, allowing her to stay attached to the workforce and maintain a healthy pregnancy amidst the pandemic. The COVID-19 pandemic has certainly shone a spotlight on the critical need for clarity around pregnancy accommodations but let us be clear: the need for this law preceded our current public health crisis and will remain in place beyond the pandemic.

Current Federal Law is Failing Pregnant Workers: The Pregnant Workers Fairness Act is the Solution

Gaps in federal law mean many pregnant workers in need of accommodation are without legal protection in non-PWFA states. As we explained in our report *Long Overdue*, “While the P[regnancy] D[iscrimination] A[ct] bans pregnancy discrimination, it requires employers to make accommodations only if they accommodate other workers, or if an employee unearths evidence of discrimination. The Americans with Disabilities Act requires employers to provide reasonable accommodations to workers with disabilities, which can include some pregnancy-related disabilities. However, pregnancy itself is not a disability, leaving a gap wherein many employers are in no way obligated to accommodate pregnant workers in need of immediate relief to stay healthy and on the job.”ⁱⁱⁱ

Original analysis we conducted for *Long Overdue* found that even though the 2015 Supreme Court *Young v. UPS* case set a new legal standard for evaluating pregnancy accommodation cases under the Pregnancy Discrimination Act, in over two-thirds of cases decided since *Young* employers were permitted to deny pregnancy workers accommodations under the Pregnancy Discrimination Act.ⁱⁱⁱ That statistic, as devastating as it is, does not account for the vast majority of pregnant workers who do not have the resources to vindicate their rights in court. Beyond being resource strapped, most pregnant workers we hear from do not have the desire to engage in

time-consuming and stressful litigation. They want to be able to receive an accommodation so they can continue working at the jobs they care about while maintaining a healthy pregnancy.

The Pregnant Workers Fairness Act is a Critical Economic Security, Maternal Health, and Racial Justice Measure

Pregnant workers that are fired or pushed out for needing accommodations face significant economic hardship. In addition to losing their livelihood, many of these workers lose their health benefits at a time when they need them most, forcing them to switch providers, delay medical care, and/or face staggering health care costs associated with pregnancy and childbirth. We worked with one woman who was eight months pregnant and whose hours were cut after she needed an accommodation which meant she also lost her health insurance. As a result, she asked her doctor if they could induce her labor early so that she would not be left facing exorbitant medical bills. In the long term, being pushed out for needing pregnancy accommodations also exacerbates the gender wage gap, as it means losing out on many types of benefits such as 401K and retirement contributions, social security contributions, pensions, as well as opportunities for promotion and growth.

Most pregnant workers may not need accommodations. However, for those who do, reasonable accommodations can avert significant health risks. For instance, in a Health Impact Assessment of state level pregnant workers fairness legislation, the Louisville, Kentucky Department of Public Health and Wellness concluded, “Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes . . . Improving birth outcomes makes a sustainable impact for a lifetime of better health.”^{iv} The report noted that those poor health outcomes can include miscarriage, preterm birth, low birth weight, preeclampsia (a serious condition and leading cause of maternal mortality), among other issues.^v According to the March of Dimes, in the U.S., nearly 1 in 10 babies are born pre-term and the preterm birth rate among Black women is nearly fifty percent higher than it is for all other women.^{vi} Preterm birth/low birthweight is a leading cause of infant mortality in America.^{vii} The Pregnant Workers Fairness Act is a key measure to reduce poor maternal and infant health outcomes.

Pregnancy accommodations are one of myriad solutions needed to address the Black maternal health crisis. Systemic racism has led to the shameful reality that Black women in this country are three to four times likelier to die from pregnancy-related causes than white women, and Black babies are more than two times as likely to die in the first year of life than white babies.^{viii} At the same time, we know Black women also face devastating health consequences when they are unable to obtain needed pregnancy accommodations to maintain their health and the health of their pregnancies. When Tasha Murell, a Black woman who worked at a warehouse in Tennessee, received a doctor’s note saying she needed a lifting restriction and complained of extreme stomach pain, she was forced to continue lifting on the job. One day, she told a supervisor she was in pain and asked to leave early. Her manager said no. Tragically, she had a miscarriage the next day. Tasha was not alone. Three more of her co-workers, also Black, miscarried after supervisors dismissed their requests for reprieve from heavy lifting. As Cherisse Scott, CEO of Memphis-based Sister Reach, explained “It doesn’t surprise me that this is the culture of that workplace. I think it's important to look at the fact that since we arrived here in chains, we [African-American women] were regarded as producers to fuel a labor force that couldn’t care less for us...”^{ix} The Pregnant Workers Fairness Act will ensure pregnant workers

and their health are valued and that Black mothers, especially, are not treated as expendable on the job.

The Pregnant Workers Fairness Act is a Bipartisan Bill That Has the Support of This Country's Largest Business Groups

The Pregnant Workers Fairness Act is not a partisan bill. Not only does it have strong bipartisan support in Congress, but thirty states and five cities including Tennessee, Kentucky, South Carolina, West Virginia, Illinois, Nebraska, and Utah already have laws requiring employers to provide accommodations for pregnant employees.^x All of the laws passed in recent years are highly similar to the federal legislation, and all passed with bipartisan, and often unanimous, support.^{xi} Many, including Tennessee's and Kentucky's, were championed by Republican legislators.^{xii}

Pregnant workers are a vital part of our economy. Three-quarters of women will be both pregnant and employed at some point during their lives.^{xiii} Ensuring pregnant workers can remain healthy and attached to the workforce is an issue of critical importance, especially as this country faces an unprecedented economic crisis. That is why leading business groups like the U.S. Chamber of Commerce, Society for Human Resources Management, many major corporations, and local chambers around the country including, Greater Louisville Inc., one of Kentucky's leading chambers of commerce, support this measure. The PWFA will provide much needed clarity in the law which will lead to informal and upfront resolutions between employers and employees and help prevent problems before they start. Furthermore, accommodations are short term and low cost.^{xiv} The Pregnant Workers Fairness Act will help employers retain valuable employees and reduce high turnover and training costs. The reasonable accommodation framework is also borrowed from the American with Disabilities framework so employers are already familiar with the standard. Furthermore, keeping pregnant workers employed saves taxpayers money in the form of unemployment insurance and other public benefits.

The Pregnant Workers Fairness Act Uses a Familiar Framework That Provides Key Protections to Pregnant Workers and Clarity to Employers

The Pregnant Workers Fairness Act has several key provisions that will address the inequality pregnant workers continue to face at work. Employers, including private employers with fifteen or more employees, will be required to provide reasonable accommodations to qualified employees absent undue hardship on the employer. Both the term "reasonable accommodation" and "undue hardship" have the same definition as outlined in the American with Disabilities Act. Similar to the Americans with Disabilities Act, employers and employees must engage in an interactive process in order to determine an appropriate accommodation. In order to prevent employers from pushing pregnant employees out on leave when they need an accommodation, the bill specifies that an employer cannot require a pregnant employee to take leave if another reasonable accommodation can be provided. The bill also includes clear anti-retaliation language such that employers cannot punish pregnant workers for requesting or using an accommodation. This is critical as many pregnant workers often do not ask for accommodations because they are afraid they will face repercussions for requesting or needing an accommodation.

Critically, the Pregnant Workers Fairness Act is also very clear that a pregnant worker need not have a disability as defined by the Americans with Disabilities Act in order to merit

accommodations under the law. Rather, the bill indicates that pregnant workers with “known limitations related to pregnancy, childbirth, and related medical conditions” are entitled to reasonable accommodations. “Known limitations” is defined as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability” as set forth in the Americans with Disabilities Act. This addresses two of the challenges the Americans with Disabilities Act has presented for pregnant workers: first, because pregnancy is not itself a disability under current disability law, a pregnant worker who has no complications but seeks an accommodation in order to avoid a complication, will not be able to get an accommodation under the Americans with Disabilities Act.^{xv} Second, even though Congress expanded the Americans with Disabilities Act in 2008, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.^{xvi} As one court concluded in 2018, “Although the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.”^{xvii}

Now, more than ever, the Pregnant Workers Fairness Act is an urgent maternal health, racial justice, and economic security measure to keep pregnant workers healthy and earning a paycheck. We cannot delay justice and fairness for pregnant workers any longer. For the sake of this country’s pregnant workers and our nation’s families, we implore Congress to put aside its many differences and pass this legislation with a strong bipartisan vote. We ask every Member of Congress to vote YES on the Pregnant Workers Fairness Act. It is long overdue.

Sincerely,



Dina Bakst
Co-Founder & Co-President
A Better Balance

ⁱ Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25.

ⁱⁱ DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 3 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

ⁱⁱⁱ *Id.* at 13-16.

^{iv} LOUISVILLE DEP’T OF PUBLIC HEALTH AND WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 2019, at 7 (2019).

^v *Id.*

^{vi} MARCH OF DIMES, 2019 MARCH OF DIMES REPORT CARD (2019), https://www.marchofdimes.org/materials/US_REPORTCARD_FINAL.pdf.

^{vii} *Infant Mortality*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> (last visited Sept. 10, 2020).

^{viii} *Pregnancy-Related Deaths*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm> (last visited Sept. 10, 2020); *Infant Mortality*, CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 7.

^{ix} Tonyaa Weathersbee, *Women Working to the Point of Miscarrying is Rooted in Callousness and Stereotypes*, MEMPHIS COM. APPEAL (Oct. 26, 2018, 5:56 PM) (quoting Cherisse Scott).

^x A BETTER BALANCE, FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS, <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> (last updated June 29, 2020).

^{xi} *Id.* at 15.

^{xii} See Hearing on H.B. 986 Before the H. Subcomm. on Employee Affairs (Tenn. Mar. 19, 2019) (Statement of Rep. Jim Coley); Hearing on S.B. 18 Before the S. Comm. on the Judiciary, 2019 Gen. Assemb., Reg. Sess. (Ky. Feb. 14, 2019) (statement of Sen. Alice Forgy Kerr), <https://www.ket.org/legislature/?archive&nola=WGAOS+020057&part=2>.

^{xiii} ALEXANDRA CAWTHORNE & MELISSA ALPERT, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND ECONOMIC SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009).

^{xiv} See JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

^{xv} *Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong., at 17 n. 77 (2019) (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance).

^{xvi} *Id.*

^{xvii} *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-cv-5999, 2018 WWL 4679582, at *6 (N.D. Ill. Sept. 28, 2018).